IN THE

Supreme Court of the United States

OCTOBER TERM—1942

No. 531

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Executor under the Will of J. Walter Zebley, deceased; THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Trustee for Madge F. Kurtz, and as Trustee for Wm. B. Kurtz; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Trustee for Florence M. Magill, under the Will of Charles L. McKeehan, deceased; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Executor of the Estate of Anton W. Eichler, deceased; ARLEIGH P. HESS; ALFRED HOEGERLE; GEORGE N. FLEMING; ELMER M. BUCKEY, as Executor of the Estate of Morris F. Miller, deceased; ALBERT J. TAYLOR, as Trustee in Bankruptcy for Kurtz Bros; HOWARD A. SEAVER; THOS. A. BIDDLE & CO.; GEORGE WOLBERT, as Executor for the Estate of Chas. E. Wolbert, deceased; ROBT. M. WILSON; CHAS. M. JONES; WALTER K. ZERRINGER; CHARLES F. SCHIBENER, Petitioners,

against

JAMES LEE KAUFFMAN, as Executor of the Estate of William Rhodes Davis, deceased; HENRY W. WILSON; JAMES LEE KAUFFMAN; WILLIAM C. BLIND and DAVIS & COMPANY, INCORPORATED, a Nevada corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Cases Cited.

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Petitioners,

against

JAMES LEE KAUFFMAN, as Executor of the Estate of William Rhodes Davis, deceased; HENRY W. WILSON; JAMES LEE KAUFFMAN; WILLIAM C. BLIND and DAVIS & COMPANY, INCORPORATED, a Nevada corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of The Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor under the Will of J. Walter Zebley, deceased, et al., respectfully shows:

1. Your petitioners, citizens of the Commonwealth of Pennsylvania, seek review of a final determination of the Court of Appeals of the State of New York dismissing with costs "on the ground that no substantial constitutional question is involved", an appeal from a decision and order of the Appellate Division, First Department, of that State, two Justices dissenting, which affirmed an order and judgment of the Supreme Court, New York County, dismissing the amended complaint of petitioners on the merits before answer under Rule 107, subdivision 5, of the Rules of Civil Practice, on the ground that this cause had been previously determined by a decision and mandate of the Supreme Court of the State of Oklahoma, in a prior action between the same parties.

Jurisdiction

2. This petition for certiorari is made under 28 U. S. C. A., Section 344, subd. (b). The basis of the application is that respondents made a motion in the Supreme Court, New York County, based upon a judgment and mandate of the Supreme Court of Oklahoma, which they contended was a bar to the further prosecution of this action in the New York court; that petitioners herein, plaintiffs in the New York County suit, opposed said motion on the ground that said judgment and mandate of the Supreme Court of Oklahoma were without force and effect because the Supreme Court of Oklahoma was without jurisdiction of the subject matter of said Oklahoma litigation. Also, because the judgment and mandate of the Oklahoma courts was issued without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and specially set up and claimed a right, privilege and immunity under the Constitution of the United States, namely, that said claim of respondents based upon said Oklahoma mandate would deprive petitioners of their property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Respondents contended in the Supreme Court, New York County, that the mandate of the Supreme Court of Oklahoma was a complete, automatic and conclusive bar to the further prosecution of this action, under Article IV, Section 1, of the Constitution of the United States, commonly known as the "full faith and credit clause". Both parties to said proceeding thereupon specially set up and claimed a right, privilege and immunity under the Constitution of the United States, and each of said parties presented and argued said claims in said Supreme Court, New York County; Appellate Division, First Department, and in the Court of Appeals of New York.

4. Said Supreme Court, New York County, ruled that said judgment and mandate of the Supreme Court of Oklahoma was entitled to full faith and credit in the Courts of New York State and was a bar to the further prosecution of this action. It thereupon held that it was "bound", by the mandate of the Supreme Court of Oklahoma, and dismissed the amended complaint on the merits. Said Supreme Court, New York County, thereby denied the claim of petitioners that the mandate had been entered without jurisdiction and without due process of law, and denied petitioners' right to the examination of the jurisdictional facts relating to those claims and sustained the claim of respondents, that the mandate of the Supreme Court of Oklahoma constituted an automatic bar. Such action of the Supreme Court, New York County, was affirmed by the Appellate Division, First Department, by a three to two decision, and by the Court of Appeals of the State of New York, and said Courts thereby sustained the claim of respondents and denied the claim of petitioners to a right, privilege and immunity under the Constitution of the United States. Petitioners accordingly claim that their property has been taken from them without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

The Opinions of the Courts below

5. The memorandum opinion of the Court of Appeals is reported in 288 N. Y. (Mem.) 149 (288 N. Y. 625). The memorandum opinion of the Appellate Division affirming the order and judgment of the Supreme Court, New York County, together with the dissenting opinion of Mr. Justice Dore, in which Presiding Justice Martin concurred, is reported at 263 App. Div. 939. The opinion of Mr. Justice Leary at Special Term, Part I, of New York County is not officially reported, but is printed in Volume VII at pages 3631-3632 of the Record. Copies of the memorandum opinion of the Court of Appeals; of the memorandum opinion and dissenting opinion in the Appellate Division; of the opinion of Mr. Justice Leary at Special Term, and abstracts of the opinion and dissenting opinion of the Supreme Court of Oklahoma, are attached hereto as Appendix A.

Timeliness of the Petition

6. The Court of Appeals remitted the record to the Supreme Court of New York, New York County, and on June 4, 1942, an order was entered thereon making the determination of the Court of Appeals the judgment of said Supreme Court.

7. Petitioners moved in said Court of Appeals for a reargument, and said motion was denied by order of the Court of Appeals, made June 18, 1942.

8. Thereafter, by order of Honorable Harlan Fiske Stone, Chief Justice of the United States, dated September 17, 1942, the time of petitioners to petition this Court for a writ of certiorari was extended for a period of sixty days from September 18, 1942. This petition is timely.

Questions Involved

9. The precise questions involved are the following:

First: Did the presentation to the New York Courts of the judgment and mandate of the Supreme Court of Oklahoma, foreclose petitioners from opposing the binding effect of said mandate on the ground that it was entered without jurisdiction and without due process of law; and therefore was the effect of the acceptance thereof by the New York Courts, to take the property of petitioners without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States?

Second: Did the raising by petitioners in the Courts of the State of New York of their right to due process of law under the Fourteenth Amendment to the Constitution of the United States, raise a substantial constitutional question?

Third: Assuming that petitioners are correct in their contention advanced in the New York Courts, that the Oklahoma Courts were without jurisdiction to enter their judgment and mandate, and likewise that said mandate was issued without due process of law, as required by the Fourteenth Amendment to the Constitution of the United States, did the New York Courts err in giving full faith and credit to the mandate of said Supreme Court of Oklahoma, under Article IV, Section 1 of the Constitution of the United States?

Fourth: Did the New York Courts err in refusing to examine the question of jurisdiction by dismissal of petitioners' amended complaint before answer, or on the contrary should the Special Term have permitted the "jurisdictional facts and the application of the rule of *res judicata*" to have been developed at a trial "and not sum-

marily disposed of on a motion before answer", as contended by two dissenting judges of the Appellate Division?

Fifth: The primary question relating to jurisdiction of the Oklahoma Courts may be stated as follows:

Did the *Bowden and Valerius* suit, instituted and prosecuted in the District Court of Tulsa County, Oklahoma, by Davis, a judgment debtor, against his judgment creditors, citizens of the Commonwealth of Pennsylvania, in the form of an alleged representative judgment creditors' action, but in truth and in fact for the sole benefit of the judgment debtor to obtain the satisfaction of the judgment, have a subject matter by virtue of which a court of equity could obtain jurisdiction of said suit?

If not, could jurisdiction be supplied solely by the fact that the suit was instituted and prosecuted in the names of dummies, acting for the judgment debtor, who falsely alleged in their sworn pleadings and proceedings that the suit was instituted and would be prosecuted as a representative action for the benefit of the judgment creditors?

See, *Hansberry* v. *Lee,* 311 U. S. 32.

Summary and Short Statement of the Matters Involved

10. On January 2, 1929, a judgment for $169,123.47 was entered in the District Court of Tulsa County, Oklahoma, against William R. Davis, after personal service of the summons. The judgment was in favor of Davis Malcona Company, a Delaware corporation, of which petitioners were preferred stockholders. The corporation subsequently was dissolved leaving the preferred stockholders the owners of the judgment.

11. In 1936 this judgment was unpaid, but in full force and effect. In August of that year, Davis wishing to relieve himself of the judgment, employed one N. E. Bowden to take the necessary steps to obtain the satisfaction of the judgment. Acting under advice of George B. Schwabe, attorney of Tulsa, Oklahoma, Bowden and an associate named Valerius, went to Philadelphia, and with money furnished by Davis purchased 290 shares of preferred stock, out of a total of 1520 shares then outstanding. Previously, Schwabe rendered an opinion letter that this procedure would probably enable Davis to obtain satisfaction of the judgment.

12. Thereafter, on December 14, 1936, Bowden and Valerius, acting for Davis as their undisclosed principal, filed a petition of intervention in the action in which the judgment had been rendered, alleging that said petition was filed on behalf of petitioners and all other owners of the judgment. The petition prayed for appointment of a receiver with power to sell the judgment and that the proceeds of sale be distributed among the parties in interest. Said intervention petition was dismissed on jurisdictional grounds, and immediately thereafter Bowden and Valerius filed a new and independent action in the District Court of Tulsa County praying for the same relief. Said action alleged that it was a representative action instituted and which would be prosecuted for the benefit of the co-owners of the Davis judgment.

13. In the original intervention proceeding a receiver was appointed on *ex parte* application. Thereafter, an affidavit was filed by A. B. Honnold, the attorney who obtained the judgment, stating that in his opinion Bowden and Valerius were acting on behalf of Davis, the judgment debtor.

14. Judge Williams of the District Court, who had appointed the receiver, thereupon heard testimony on this

points, and Bowden, Valerius and Schwabe, their attorney, swore falsely that Davis had no connection with the proceeding, although up to the date of the hearing (February 24, 1937), Davis, or companies which he controlled, had advanced Bowden $8,886.16 for legal fees and other expenses, and had paid direct to Schwabe $100 as a fee for his legal opinion on the validity of the judgment and the best means of obtaining its satisfaction.

15. In the plenary suit instituted May 5, 1937, Judge Williams, who heard the testimony in the intervention proceeding, in which it was asserted that Bowden and Valerius were not acting for Davis, appointed a receiver, after stipulating that notice of the appointment should be given to Honnold. In the meantime Bowden had come to terms with Honnold, and on June 17, 1937, signed an agreement with Honnold for the purchase of the judgment for $15,120. Of this Honnold was to receive $5,000 as a fee, $1000 was to go for expenses, and $9,120 or $6.00 a share was to be distributed to the preferred stockholders, less $1,740, or the amount distributable to Bowden and Valerius on the 290 shares previously purchased by them with money supplied by Davis, which it was agreed should be paid to Honnold as additional compensation, making a total of $6740, to be received by Honnold.

16. This agreement was approved by Davis who caused the sum of $15,120 to be placed in escrow to be drawn upon when the sale should be confirmed, and a bill of sale issued to his nominee. Honnold thereupon filed an answer, admitting the allegations of the suit, and joined in the prayer that the judgment be sold. Also, he joined in a petition as a result of which an order to show cause why the sale should not be approved was mailed to all of the preferred stockholders. In this and other communications sent to the preferred stockholders it was asserted that the action was brought and would be prosecuted for their benefit. All the petitioners believed that their representa-

tions were true. They learned to the contrary only after the sale of the judgment. (R., Vol. I, pp. 225-226, 227-228, 229-230, 231; Vol. III, pp. 1417-1428; Vol. VI, pp. 3022-3025, 3047-3050; Vol. VII, pp. 3123-3125, 3166-3168, 3179-3182, 3225, 3245, 3309-3310, 3334-3336, 3338-3354, 3356-3395, 3554-3572; Vol. II, pp. 576-627.)

17. In the meantime Davis, who did not completely trust Bowden, required that he execute to Davis five notes for $50,000 each, all of them fictitious, in order to give Davis a set-off for the approximate amount of the judgment and interest, in the event that Bowden should acquire the judgment and attempt to enforce it. Thereafter, this procedure was reconsidered and Davis caused Bowden to assign his interest in the purchase contract of June 17, 1937 with Honnold, to S. R. Thornburg, a personal friend and business associate of Davis, and to nominate Thornburg as the person to whom the judgment should be sold.

18. The order to show cause why the sale of the judgment should not be confirmed was returnable in the Tulsa Court, September 7, 1937. On that date Schwabe had not been paid the total amount of his fees, and he therefore continued the matter until September 13. The result was that on September 9, 1937, Davis' personal attorney, James Lee Kauffman, went to Tulsa and paid Schwabe $2,362.00 which with $2,158.21 previously paid by Bowden from moneys advanced by Davis made a total payment to Schwabe of $4,520.21 of which $4,000 represented his fee for services in securing the sale of the Davis judgment, and the balance his expenses. At the same time, Kauffman paid Valerius, co-plaintiff in the suit $600, for his compensation, for acting as a dummy co-plaintiff for Davis. As stated by the Supreme Court of Oklahoma, Valerius was "only a handy man, who gave his name to the proceedings" (R., Vol. I, fols. 110-113).

19. Schwabe's fees having been paid, on September 13, 1937, he presented to and obtained from Judge Williams an order approving and confirming the sale of the Davis judgment by the receiver to S. R. Thornburg, friend and nominee of Davis. Thornburg thereupon satisfied the judgment. In connection with this order the Court made a journal entry of judgment to the effect that the action was a representative one brought for the benefit of all of the co-owners of the Davis judgment. The record of the subsequent trial showed total payments made by Davis to Bowden, Valerius, Schwabe and others to secure the satisfaction of this judgment, amounted to $30,418.16.

20. Petitioners in October, 1937, having learned the real nature of the Bowden and Valerius suit, namely, that it was not brought in good faith for their benefit, but in truth and in fact was an action brought by Davis to secure the satisfaction of the judgment for his own account, on October 22, 1937, filed a petition in the District Court of Tulsa County, Oklahoma, praying that the order confirming the sale of the Davis judgment be set aside for fraud. The issues so raised were tried in the District Court of Tulsa County, in May, 1938, before Judge Staley who had succeeded Judge Williams in that Court. The facts above set forth including expenditures by Davis were proven in great detail, and Davis' employment of Bowden and the proceedings to bring about the sale of the judgment were shown beyond dispute. Judge Staley thereupon rendered a judgment setting aside the order of sale on the ground that it had been obtained by "gross fraud" upon the court and upon the co-owners of the Davis judgment. The decision and judgment of Staley, J. contained written findings of fact and conclusions of law, setting forth the major facts referred to above in this petition. From that judgment Davis appealed to the Supreme Court of Oklahoma.

21. The Supreme Court of Oklahoma, two judges sharply dissenting, reversed the judgment of Judge Staley

and reinstated the order of sale. The ground for the reversal, was that no fraud or deceit was practiced on the Court since Judge Williams knew or was on notice by reason of the affidavit filed by Honnold, that Bowden and Valerius were acting for Davis, and that the petitioners herein, as co-owners of the Davis judgment, were not defrauded because no false statements had been made to them. This was predicated on the fact that these petitioners did not sell the judgment but that it was sold by the Receiver, appointed by the Court, allegedly for their benefit and at the Court's direction.

However, the Supreme Court of Oklahoma reversed the decision and judgment of Staley, J., vacating the sale and satisfaction of the judgment for fraud, on the primary ground that Judge Williams could not be deceived as to matters within his knowledge (R., Vol. I, fols. 117-120).

In other words, if Davis, the judgment debtor, brought a fictitious suit in the names of dummies, on the alleged ground that it was a representative action for the benefit of the co-owners of the judgment, and the co-owners were so advised and believed such fact, still their property might be sold for a pittance and they might be deprived thereof because the judge himself knew that the allegations in the pleadings and proceedings were false.

It is to be observed that in a journal entry of judgment, entered simultaneously with the granting of the order of sale, the fact that the suit was a representative cause of action was stated for alleged judisdictional purposes, as follows:

> "That this is an action brought by the plaintiffs, as owners of 290 shares of the preferred stock of Davis Malcona Company, formerly a corporation, for the benefit of plaintiffs and all other stockholders of said former corporation, and their successors in interest, and that the Court has jurisdiction of the

subject matter of this action and of the parties hereto, and has heretofore appointed Tom D. Durham of Tulsa, Oklahoma, as receiver in this cause of said judgment heretofore rendered in said cause No. 25845 in this court, and that he ever since has been and still is the duly appointed, qualified and acting receiver of said judgment, and that said judgment is the sole remaining asset of said Davis Malcona Company, formerly a corporation, which judgment is now owned by the former stockholders of Davis Malcona Company, and their successors in interest, and that the owners of said judgment are entitled to have said judgment collected, sold or otherwise liquidated and the proceeds obtained therefrom partitioned and distributed among such other stockholders of Davis Malcona Company, and their successors in interest, as their respective interests may appear" (R., Vol. II, p. 620, fols. 1858-1859).

That Judge Williams knew that this recital in the Journal Entry of Judgment was false is given by the Supreme Court of Oklahoma as the express ground of reversing the decision of Staley, J., vacating the sale of the Davis judgment for fraud (R., Vol. I, pp. 38-41).

And this is done in the name of due process of law.

22. In February, 1938, while the above proceedings were pending in Oklahoma, this action was brought in the Supreme Court, New York County against Davis, who was a resident of the State of New York. In the amended complaint filed after the decision of Judge Staley, the first cause of action is against Davis based upon the original judgment of $169,123.47; the second cause of action is against Davis under the Debtor and Creditor Law of New York for fraudulent concealment and transfer of assets, and the remaining causes of action are to recover damages from the defendants other than Davis, for acts constituting a conspiracy to defraud, incident to the prosecution of the *Bowden and Valerius* suit in the Oklahoma Courts.

23. After the decision of the Supreme Court of Oklahoma reversing the judgment of Judge Staley, respondents above named moved at Special Term under Rule 107, subdivision 5, of Rules of Civil Practice on an exemplified copy of the mandate of the Supreme Court of Oklahoma, to dismiss the amended complaint on the ground that there was an existing final judgment of a court of competent jurisdiction rendered on the merits determining the cause of action between the parties. Respondents, as defendants in the New York action, at that time had not answered owing to an *ex parte* stay of proceedings obtained by respondents from the Supreme Court of Oklahoma. No answer was ever filed (R. Vol. IV, pp. 2117-2134).

24. Petitioners in opposition to the motion put in the whole record of the proceedings in the Oklahoma Courts relating to the sale and satisfaction of the Davis judgment, including the testimony and exhibits in the trial before Judge Staley (R. Vols. II, III, IV, V). Petitioners also expressly contended that the order of the District Court of Tulsa County confirming the sale of the Davis judgment and the mandate of the Supreme Court of Oklahoma reinstating that order, were not entitled to full faith and credit in the courts of New York, for the reason that the order of sale was entered in a proceeding of which the District Court did not have jurisdiction, since it was in fact a suit by a judgment-debtor against his judgment-creditors to obtain the satisfaction of a judgment by means other than payment in full of the amount owed, a proceeding unknown to the law, and that the mandate of the Supreme Court of Oklahoma purporting to reinstate the order did not and could not confer jurisdiction for the purpose of reinstating a void and illegal order of sale (R., Vol. I, pp. 447-453).

25. The Special Term held that it "was bound" by the mandate of the Supreme Court of Oklahoma and thereby granted the motions of respondents and dismissed the

amended complaint. On appeal, the Appellate Division, First Department, affirmed the order and judgment of dismissal, two justices, against three, dissenting on the ground that the issues raised by the affidavits and exhibits of petitioners should be tried, "and not summarily disposed of on a motion before answer" (R. Vol. VII, fol. 10964). The Court of Appeals thereupon dismissed the appeal on the ground "that no substantial constitutional question was involved".

26. Petitioners now seek a review by this court for the following reasons:

The alleged suit brought by Bowden and Valerius for the sale of the Davis judgment was in fact a proceeding by Davis, the judgment-debtor, against his judgment-creditors to bring about the sale of the judgment to himself, for a trifling consideration; that such a proceeding is unknown to the law and no court has jurisdiction in an action by a judgment-debtor, to give relief by appointment of a receiver to sell the judgment so that the judgment-debtor himself can acquire it and obtain its satisfaction; that jurisdiction otherwise lacking is not supplied because the judgment-debtor employed dummies to institute the action who were the agents of the judgment-debtor, but falsely and fraudulently alleged that the suit was instituted and would be prosecuted for the benefit of the co-owners of the judgment, namely, as a representative action for the benefit of the judgment-creditors; that such false allegations did not create jurisdiction where jurisdiction was otherwise lacking. In short, that there is no proceeding known to the law as a "judgment-debtor's suit", and that such lack of jurisdiction was not remedied or supplied by falsely alleging that the suit was a representative *judgment-creditors' suit.* Therefore, that the District Court of Tulsa County, Oklahoma was without jurisdiction of the subject matter of the *Bowden and Valerius* suit, instituted for the benefit of Davis, the judgment-debtor, and at his

expense and the Supreme Court of Oklahoma, equally was without jurisdiction to reinstate a void order of sale or thereby validate or reinstate the satisfaction of the Davis' judgment.

Hansberry v. *Lee,* 311 U. S. 32;
Western Life Indemnity Co. v. *Rupp,* 235 U. S. 261, 273;
Tamly v. *Olico,* 273 U. S. 510;
United States v. *Throckmorton,* 98 U. S. 61, 65, 66.

Therefore that the order of sale of the District Court of Tulsa County and the mandate of the Supreme Court of Oklahoma, purporting to reinstate that order, are null and void and are not entitled to any credit in the courts of a sister state, and that the decisions of the New York courts to the contrary resulted in taking the property of petitioners without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Reasons for Allowance of Writ.

A writ of certiorari should be granted, because:

(1) It is of paramount importance to every litigant in the entire United States, that a doctrine, so contrary to all principles of due process of law, as the doctrine of the opinion and decision of the Supreme Court of Oklahoma in the case at bar, should be authoritatively disaffirmed, which can be done only by this Court.

(2) It is of importance that judgments of the courts of the several states when rendered in proceedings of which they have no jurisdiction should not be given extraterritorial effect by virtue of the full faith and credit clause of the Constitution of the United States.

(3) The decision of the Supreme Court of Oklahoma that a judgment debtor may bring in the names of his agents, a proceeding against his judgment creditors to have a judgment sold or disposed of for his benefit, concealing his own interest in the proceeding, is a holding that courts may be used for the perpetration of fraud, which is a doctrine abhorrant to the law.

(4) The holding of the New York Court of Appeals that it is bound to give full faith and credit to the judgment of the courts of Oklahoma rendered in a proceeding over which those courts did not and could not have jurisdiction is contrary to the decisions of this court and the established law on the application of both the due process of law clause and the full faith and credit clause of the Constitution of the United States.

(5) The effect of the decision of the Courts of Oklahoma in the Bowden and Valerius proceeding and of the courts of New York in the present case has been to deprive your petitioners of their property without due process of law, contrary to the law of the land.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case entitled, *Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor, etc.,* v. *Davis,* and that the determination of the Court of Appeals of the State of New York, and judgment thereon may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioners will forever pray.

Dated, November 16, 1942.

Respectfully submitted,

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Executor under the Will of J. Walter Zebley, Deceased, et al.,

Petitioners.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The jurisdiction of this Court is involved on the grounds set forth under the heading "Jurisdiction" in the petition.

Statement of the Case

A statement of the material facts in this case is set forth in the petition.

Specification of Errors

(1) The Court of Appeals of the State of New York erred in holding that the order and judgment of sale of the District Court of Tulsa County and the judgment and mandate of the Supreme Court of Oklahoma, in the *Bowden and Valerius action,* were entitled to full faith and credit in the Courts of the State of New York, under Article IV, Section 1 of the Constitution of the United States, as against the claim of lack of jurisdiction and lack of due process of law advanced in the New York Courts by petitioners.

(2) The Court of Appeals erred in not holding that petitioners, as plaintiffs in that Court, were entitled to have all "jurisdictional facts fully developed at a trial, and not summarily disposed of on a motion before answer", as pointed out by the dissenting judges of the Appellate Division (R., Vol. VII, fol. 10964).

(3) The Court of Appeals erred in holding that said judgments and mandate of the Oklahoma Courts were not

void as having been rendered in a proceeding of which said courts did not and could not have jurisdiction of the subject matter.

(4) The Court of Appeals erred in holding that petitioners were not deprived of their property by said judgments and mandate of the Oklahoma courts, without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

(5) The Court of Appeals erred in holding that the appeal of petitioners to said Court did not involve a substantial constitutional question.

(6) The Court of Appeals erred in holding that the judgments and mandate of the Oklahoma courts constituted a bar to the prosecution of this action in the courts of New York.

(7) The Court of Appeals erred in affirming the order and judgment of the Supreme Court, New York County, and of the Appellate Division, First Department, dismissing the amended complaint herein on the merits.

Argument

The facts set forth in the petition show that the judgment of the Oklahoma Courts, which has been held by the New York Courts to be a bar to the present action, was rendered in a proceeding which was in fact an action by a judgment-debtor against his judgment-creditors to have the judgment against himself, sold to himself, for a negligible consideration. It is the contention of petitioners that no court has jurisdiction of a proceeding of this nature and that consequently the judgment of sale of the District Court of Tulsa County, approving the sale, and the mandate of the Supreme Court of Oklahoma rein-

stating the order of sale, are absolute nullities and can have no force or effect in any other state under the due process of law clause.

The principles governing the giving of full faith and credit in one state to the judgment of a sister state are too well settled to need extended restatement. This Court has held repeatedly that lack of jurisdiction of the subject matter of the action will preclude the giving of full faith and credit to the judgment of another state. Furthermore no state can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law required by the Constitution of the United States.

Hansberry v. *Lee,* 311 U. S. 32;
Western Life Indemnity Co. v. *Rupp,* 235 U. S. 261, 273;
Old Wayne Mutual Life Assn. v. *McDonough,* 204 U. S. 815;
United States v. *Throckmorton,* 98 U. S. 61, 65.

In *Old Wayne Mutual Life Assn.* v. *McDonough, supra,* this Court said, at page 15:

> "The constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party. *Scott* v. *McNeal,* 154 U. S. 34, 46."

Also, when the judgment of one court according to another court the binding force and effect of *res adjudi-*

cata is challenged for want of due process of law, it becomes the duty of such Court and likewise of this Court, to examine the procedure in both litigations.

Thus this Court in *Hansberry* v. *Lee, supra,* said at page 40:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under State constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a State court, ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose right has been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp,* 235 U. S. 261, 273."

In the case at bar petitioners challenge the binding effect of the Oklahoma judgment on their cause of action in New York for the reason that that judgment was rendered in a proceeding over which the Oklahoma courts did not and could not have jurisdiction. A valid judgment constitutes the exercise of judicial power. Judicial power as that term is understood in our fundamental law applies only to the determination of justiciable controversies between parties. The cause of action must be *bona fide. Muskrat* v. *United States,* 219 U. S. 346. Jurisdiction does not extend to the determination of suits in which there is no valid subject matter.

Thus it was said by this Court in the case of *Lord* v. *Veazie,* 8 How. 251, in speaking of a judgment rendered in a collusive suit, at pages 255-256:

> "A judgment entered under such circumstances and for such purposes, is a mere form. * * * a judgment

> in form, thus procured, in the eye of the law is no judgment of the Court. It is a nullity, and no writ of errors will lie upon it."

And in the case of *Hatfield* v. *King,* 184 U. S. 162 at pages 165-166, this Court said:

> "If it be true, as claimed by some of the many parties, that this is a collusive suit, that there is no **real controversy between** the plaintiff and defendants, that the plaintiff has been controlling the litigation on both sides with a view of obtaining an opinion on a matter of law in which he is interested, the transaction is one which, as stated, courts of justice have always reprehended, and should be treated as a punishable contempt, and no decree entered under those circumstances should be permitted to stand."

It is submitted that a suit by a *judgment debtor* against his judgment creditors to relieve himself of the obligations of the judgment is a proceeding unknown to the law, and is as wanting in a justiciable subject matter, as was held in the *Veazie* case.

It is plain that this was the true nature of the *Bowden and Valerius* suit in the District Court of Tulsa County. A valid judgment was outstanding against Davis in the Oklahoma court. Davis lived in New York. The owners of the judgment were a group of former stockholders of the dissolved corporation, Davis Malcona Company. Davis got an opinion from Schwabe, an attorney of Tulsa, Oklahoma, as to how to dispose of the judgment (R. Vol. II, pp. 1075-1086). Davis agreed to furnish all money necessary for prosecuting a fictitious suit in the names of dummies in order to obtain the satisfaction on the judgment (R. Vol. III, fols. 4458-4460; p. 1118). Bowden and Valerius with money furnished by Davis, the judgment debtor, purchased 290 shares of the preferred stock of Davis Malcona Company. This stock, when purchased,

in fact and in law belonged to the judgment debtor. It was purchased for a fraudulent and fictitious purpose.

Based upon their nominal ownership of this stock Bowden and Valerius instituted an action in the District Court of Tulsa County asking for the sale of this judgment. In the petition it was alleged that

> "this action is filed and presented for and on behalf of these plaintiffs and all others interested as co-owners of said judgment and entitled to participate in the proceeds arising from the liquidation thereof" (R. Vol. II, pp. 946-947).

In truth and in fact, however, said action was not filed, presented or prosecuted in behalf of the nominal plaintiffs and all others interested as co-owners of said judgment. On the contrary, it was filed and prosecuted in behalf of the judgment debtor and its purpose was not to benefit the owners of the judgment, but to enable the judgment debtor to purchase and satisfy the judgment for his own unlawful purpose.

That this was the admitted nature of the action is shown by the opinion letter of George B. Schwabe dated September 30, 1936 (R. Vol. II, pp. 1075-1086), in which the very steps which ultimately were taken were outlined in advance by Schwabe for the purpose of relieving Davis of his obligations under the judgment.

That the subject matter of the *Bowden and Valerius* action was one of which no court could take jurisdiction will be seen by disregarding the nominal ownership of the preferred stock by the plaintiffs and substituting in their place, the real owner, Davis, the judgment-debtor.

Did Davis the judgment-debtor have any cause of action which at the time in question he was able to enforce in his own name as judgment-debtor? That is the only question in this case. Did the Tulsa Court have juris-

diction, on a petition by Davis to appoint a receiver of the judgment, with power to sell or dispose of the same to the nominee of the judgment-debtor for the purchase of enabling him to obtain its satisfaction? If not, then that Court could not do indirectly, that which it could not do directly.

It was as said by Judge Hurst in his sharp dissent in the Supreme Court of Oklahoma:

> "In the present case the deception practiced was cleverly screened by following an apparently adversary legal procedure, such as making the stockholders parties defendant, giving notice of the order to show cause, and the appointment of a receiver to sell the stock, which gave an additional appearance of fairness and good faith to the proceeding. But the court should look to the substance, not to the form. I cannot escape the conclusion that the proceeding resulting in the sale of this judgment was from its inception designed to, and did, perpetrate a fraud upon the court in which it was brought, and upon the stockholders who owned the judgment. From the purchase of stock by the agents of Davis, in order that they might, as apparently bona fide stockholders request that the judgment be sold, down to the consummation of their fraudulent purpose, every move made in the proceeding, and all the evidence produced by them, was made and done to conceal their real purpose, and to impose upon the court and the stockholders. No such deception or fraud as that contained in the record in the instant case was present in the cases relied upon in the majority opinion, on which the first syllabus is predicated.
>
> "This cause had its beginning in 1924 in breach of trust and embezzlement and its ending in 1937 in deception, concealment and perjury. It is my view that courts of justice have no higher duty than to see to it that parties guilty of such conduct do not profit thereby. I regret to see this court render a decision that permits Davis to profit by his fraudulent scheme" (R., Vol. I, fols. 1656-1668).

There is only one answer to the proposition so presented, and that is that such a proceeding is one utterly unknown to the law.

A judgment-debtor has only one obligation, namely to pay his adjudicated obligation to his judgment-creditors. It was therefore the legal duty of this judgment-debtor to perform the obligations imposed on him by the judgment in accordance with its terms. Until he did so he had no rights whatever against his judgment-creditors. Then he was entitled to a satisfaction of the judgment. This judgment-debtor certainly did not have the right, while the judgment was unpaid, to have it sold or disposed of for his benefit, in order to obtain its satisfaction.

Any proceeding by the judgment-debtor to accomplish that object did not have a justiciable subject matter, and any judgment or decree of a court which attempted or purported to give any such relief was a nullity.

This is the general law of the land, known as due process of law. It could hardly be contended, if Davis himelf had been the plaintiff in the Tulsa action, that the judgment of sale of the District Court of Tulsa County would be entitled to full faith or credit in the courts of another state, or that the mandate of the Supreme Court of Oklahoma reinstating such order or judgment of sale could have had any greater force or effect.

It is submitted that, because the paid agents of Davis were the nominal plaintiffs, the judgment of the Oklahoma Court has no further or greater validity. There is the same lack of a justiciable subject matter of the action; the same lack of jurisdiction to make a binding determination, as if Davis, the judgment-debtor, had been the plaintiff. Hence when the true nature of the action was brought to the knowledge of the Oklahoma Courts, the only course open to them was to refuse to make any determination because of lack of jurisdiction, and if such

courts did attempt to make a determination that was not a binding judicial act, but mere form, of no force or effect anywhere when examined in the light of the constitutional requirement of due process of law.

The only way that Davis succeeded in bringing his fictitious litigation before the Tulsa Court was by having the suit brought in the name of his paid agents and dummies, upon the false allegation that the suit was instituted and would be prosecuted for the benefit of all the co-owners of the judgment. It will hardly be contended that, if there was no jurisdiction in the Court to entertain a suit by Davis, the judgment debtor, against his judgment creditors, to have the judgment sold or disposed of, then also there was no jurisdiction if the suit was brought in the names of paid agents and containing false jurisdictional allegations.

Jurisdiction is a question of substance and not of form, and if the Oklahoma courts did not have jurisdiction to hear and determine a suit brought by Davis himself against his judgment creditors, then they did not acquire jurisdiction if the suit was brought in the name of paid agents of the judgment debtor. If in fact there is no justiciable controversy between the parties, such a controversy is not created by changing the form or by filing false and fictitious pleadings. That would make a court of justice an agency for determining fictitious and collusive disputes, and for perpetrating frauds, a proposition abhorrent to all conceptions of law and equity.

If there was no jurisdiction of the subject matter permitting the District Court of Tulsa County to make the order then there was no jurisdiction of the subject matter in the Supreme Court of Oklahoma permitting it to reinstate the order after it had been vacated for fraud.

It will be noted that Judge Williams, as soon as the charge was made that Davis was the real party in interest in the *Bowden and Valerius* intervention proceeding, held

a hearing for the purpose of determining the facts. If he had found that Davis was the real party in interest the lack of jurisdiction in the Court to make any determination disposing of the judgment would have been plain. That the real facts were withheld from the Court by the giving of untrue and false testimony on the hearing in the intervention proceeding (R., Vol. II, pp. 889-924), certainly could not give it jurisdiction.

It may be argued that the Supreme Court of Oklahoma has held in this case that it is the law of that state that a judgment debtor may through his paid agents sue his judgment creditors in the courts of that state to have the judgment sold for his benefit, and that although this is not the law of other states, the judgment of the Oklahoma Court is nevertheless entitled to full faith and credit in other states, under the full faith and credit clause of the Constitution. That in fact, is what Leary, J., and the other New York Courts held.

However, that is not the law, once the full faith and credit clause of the Constitution (Fourteenth Amendment) is invoked.

Hansberry v. *Lee,* 311 U. S. 32;
Fauntelroy v. *Lunn,* 210 U. S. 230.

Such argument completely overlooks the qualification which exists to the full faith and credit clause, namely, that any judgment for which full faith and credit is claimed must be rendered in accordance with due process of law, as that term is defined by the fundamental law of the land and as expressly required by the Fourteenth Amendment.

It certainly is not due process of law for one state to permit a judgment debtor residing in another State, to come into its courts through and in the name of his paid agents and, under the guise of protecting the interests

of the judgment creditors, to deprive them of their property in the judgment for the benefit of the judgment debtor. Whether this be the law of Oklahoma, that state cannot complain if her sister states are not obligated to give full faith and credit to her judgments carrying out such a baneful law. In any event, the due process of law clause in the Constitution of the United States is to the contrary.

It was not the intention of the framers of the Constitution that each state should give full faith and credit to every judgment of another state unless such judgment be rendered in accordance with accepted principles of jurisprudence.

In the case at bar it is clear that the decision of the Supreme Court of Oklahoma lays down a doctrine which is repugnant to every conception of law and justice. It approves a suit by a judgment debtor against his judgment creditors to deprive them of their rights in the judgment which they own. It condones the bringing of such suit in the name of paid agents. thereby concealing the interest of the judgment debtor therein, and of presenting false allegations to the effect that the suit was brought for their benefit and protection, when in truth and fact it was brought solely for the benefit of the judgment debtor and against the interests of the judgment creditors.

The New York courts have seen fit to give effect to the judgment of the Oklahoma Courts and to treat it as a bar to an action in New York to compel the judgment debtor to perform his obligations under the judgment validly entered against him. Petitioners now ask this Court to review this action of the New York Courts and to determine whether such decision is in accordance with the supreme law of the land.

It is respectfully submitted that it is not.

Hansberry v. *Lee,* 311 U. S. 32.

Conclusion

The Courts of Oklahoma by a supposed order of sale, judgment and mandate, rendered in a proceeding by a judgment debtor against his judgment creditors to dispose of the judgment for his benefit, a proceeding which furnished no justiciable subject matter of a suit by these or any other Courts, have disposed of petitioners' property in the Davis judgment.

The courts of New York have failed to give relief, holding that they were bound under Article IV, Section 1 of the Constitution of the United States, to give full faith and credit to these alleged judicial proceedings of the Courts of Oklahoma. The result has been that these petitioners have been deprived of their property in the Davis judgment without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. This writ of certiorari should be granted to the end that this Court may review the actions of the Courts of Oklahoma and of New York, and that the present judgment of dismissal against these petitioners may be reversed.

The petition for certiorari should be granted.

Respectfully submitted,

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Of Counsel.

APPENDIX A

1. Memorandum Opinion of Court of Appeals.

Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor of J. Walter Zebley, Deceased, et al., Appellants v. *James L. Kauffman, as Executor of William R. Davis, Deceased, et al., Respondents.*

Appeal, on constitutional grounds, from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department, entered March 4, 1942, which affirmed a judgment entered upon an order of the court at Special Term (Leary, J.) granting a motion by defendants for judgment dismissing the amended complaint herein, before answer, pursuant to rule 107 of the Rules of Civil Practice, on the ground that it did not state facts sufficient to constitute a cause of action, and for other incidental relief. One Davis was president of a Delaware corporation which was wound up through receivership proceedings with the result that the only asset remaining was a judgment against Davis which the stockholders of the Delaware corporation, plaintiffs herein, obtained in an action which they brought against him in the State of Oklahoma. At the instigation of Davis and with money supplied by him, shares of the Delaware corporation were thereafter bought by persons who intervened in the Oklahoma action and who applied therein for a sale of the judgment against Davis. While that application was denied by the District Court of Oklahoma, subsequently in an independent action for the same relief, such court directed an assignment of the judgment against Davis to his nominee for a consideration, and through the carrying out of that direction the judgment against Davis was released and satisfied. In subsequent litigation the canceling of such judgment was sustained by the Supreme

Court of Oklahoma. The plaintiff thereafter brought the present action in the Supreme Court of this State, basing their right to recover upon the judgment *originally* obtained against Davis in the State of Oklahoma. The Special Term dismissed the complaint on the ground that it was bound, under the full faith and credit clause of the Federal Constitution (Art. IV, § 1), by the judgment of the Supreme Court of Oklahoma.

Orville C. Sanborn, Richard S. Holmes and George E. Reynolds for appellants.

C. Horace Tuttle and John F. Faulkner for respondents.

Appeal dismissed, with costs, on the ground that no substantial constitutional question is involved. No opinion. (See 288 N. Y. 625.)

Concur: Lehman, Ch. J., Loughran, Finch, Rippey, Lewis, Conway and Desmond, JJ.

2. Memorandum Opinion of Appellate Division and Dissenting Opinion of Dore, J.

The Pennsylvania Company for Insurance on Lives and Granting Annuities, as Executor, Etc., of J. Walter Zebley, Deceased, and Others, Appellants, v. *James Lee Kauffman, as Executor, Etc., of William Rhodes Davis, Deceased, and Others, Respondents, Impleaded With Others, Defendants.*

Appeal by the plaintiffs from an order of the Supreme Court, entered in the New York county clerk's office on September 11, 1940, granting a motion of defendants William R. Davis and others to dismiss the amended complaint for insufficiency pursuant to subdivisions 5 and 7 of rule 107 of the Rules of Civil Practice, vacating the temporary injunction, and denying plaintiffs' cross-motion for leave

to further amend the amended complaint and for other relief, and from the judgment entered thereon.

Judgment and order affirmed, with costs. No opinion.

Present—Martin, P. J., O'Malley, Townley, Dore and Cohn, JJ.; Martin, P. J., and Dore, J., dissent; dissenting opinion by Dore, J.

Dore, J. (dissenting). We think we should deny this motion to dismiss under subdivisions 5 and 7 of rule 107 of the Rules of Civil Practice so that disputed issues as to jurisdictional facts and the application of the rule of *res judicata* to all the parties involved may be fully developed at a trial and not summarily disposed of on a motion before answer. Accordingly, we dissent and vote to reverse the judgment and order appealed from granting defendants' motion and denying plaintiffs' cross-motion to file an amended complaint and to deny defendants' said motion and grant plaintiffs' motion to file an amended complaint.

Martin, P. J., concurs.

3. Opinion of Mr. Justice Leary at Special Term, Part I, Supreme Court, New York County.

(New York Law Journal, August 28, 1940)

By Mr. Justice Leary.

Pennsylvania Co. for Insurance on Lives & Granting Annuities, &c., et al., v. *Davis*—The defendants move to dismiss the first cause of action against the defendant Davis upon the ground that the judgment upon which the cause of action is based has been released and discharged of record; to dismiss the second cause of action against all of the defendants and the balance of the causes of action

against all of the defendants other than Davis on the ground that there is an existing final judgment of the Supreme Court of the State of Oklahoma determinative of all of the causes of action; to dissolve and vacate temporary injunction orders against the defendant Davis and Davis & Co., Inc., on the ground that the complaint does not state a cause of action for the reasons previously stated. The plaintiff cross-moves to amend the amended complaint and for additional relief. The basic question for determination is, may this court, under all the facts submitted, pass on the mandate of the Supreme Court of Oklahoma, or is it bound by Article IV, section 1 of the Constitution of the United States (full faith and credit clause). The plaintiff asks that this court decide that the court of first resort in Oklahoma lacked jurisdiction, though that question has been determined adversely to the plaintiff here in the court of last resort in Oklahoma. Plaintiff also attacks the decision of the Supreme Court of Oklahoma as being corrupt. The Supreme Court of the United Stataes in *Green* v. *Van Buskirk* (168 Wall. 139), *Carpenter* v. *Strange* (141 U. S. 87), *Fauntleroy* v. *Lum* (210 U. S. 230) and the numerous other authorities cited in those cases precludes the action urged by the plaintiff. Our Court of Appeals in *Smith* v. *Central Trust Co.* (154 N. Y. 333), recognized the same principle, as did the Supreme Court of Oklahoma in *Goodeagle* v. *Moore* (89 Okl. 211). The defendant's motion is in all respects granted and the plaintiffs' motion is denied. Settle order.

4. Excerpt from Majority Opinion of Supreme Court of Oklahoma, and Excerpt from Dissenting Opinion of Hurst, J.

Majority Opinion:

"On the other questions the testimony and exhibits cover more than 1050 typewritten pages in the rec-

ord. It is, therefore, not practical to set forth the evidence or even the substance thereof in full. The record does disclose, however, that the idea of a sale or liquidation of the judgment against Davis originated with Bowden. He evidently learned of the judgment, and had some information to the effect that Davis might be able to assist him in a material way in financing his (Bowden's) sale stamp enterprise. It appears that he conceived the idea that if he could obtain the judgment or control thereof he could use it to move Davis to his assistance. He first talked to Honnold about it and apparently led him to believe that he could and would pay something like $50,000.00 for the judgment. He was unable to raise that sum or anything like it. Thereafter he went to New York and contacted Davis, and from that time on Bowden and Davis were acting together. They, through Bowden, had Mr. Schwabe investigate the record and advise as to whether the judgment was valid. Upon learning that the judgment could not be set aside, they proceeded under the apparent advice of Schwabe to buy up some 290 shares of the preferred stock of the Davis Malcona Company. The stockholders were the real owners of the judgment. Davis, or some corporation in which he was interested, furnished the money with which to purchase said stock and to pay all the expenses incident to, or connected with, the whole transaction including Schwabe's attorney's fees. Davis apparently knew all about the activities of Bowden and Valerius. Valerius appears to have been only a handy man who gave his name to the proceedings. Davis apparently did not trust Bowden entirely, and by himself, or through his legal advisers, insisted that when and if the sale of the judgment was consummated, the sale and assignment must be made to Bowden or his nominee, and insisted on selecting the nominee in the person of Thornburg."

(For full opinion see Vol. 1, pp. 20-45; 187 Okl. 436, P. 2d 380.)

Appendix

Dissenting opinion of Hurst, J.:

"I am of the opinion that the record does not justify a reversal, and that the conduct of Davis was such that he is not entitled to prevail. Briefly, the record is as follows: In 1923 Davis was instrumental in organizing the Davis-Malcona Company and became its President and, with one Hibbs, its manager. Soon thereafter he fraudulently converted to his own use some $130,000 of the funds of the company. This embezzlement by Davis was followed by the insolvency and receivership of the company. On January 2, 1929, judgment was rendered against him for $169,123.47 by reason of such misappropriation, in an action instituted in February 1924 by the preferred stockholders of said company. In 1936, Davis being anxious to get rid of the judgment, employed Bowden as his agent to purchase some of the preferred stock of the company so that as a stockholder he could institute proceedings to procure the sale of the judgment so he could purchase it in the name of his agent and get satisfaction of the judgment. Bowden interested Valerius in the transaction. The agents so employed, with money furnished by Davis, purchased stock in the company, and in their own names sought to intervene in the original action. In February, 1937, objections by the plaintiff's attorneys to such intervention were set for hearing. It was then charged that Bowden and Valerius were in fact representing Davis, but at that hearing both Bowden and Valerius falsely testified that Davis was not being represented by them. Bowden, in the subsequent hearing before Judge Staley, admitted that Davis furnished the money to buy the stock. Davis also admitted that he so furnished the money. The plea of intervention was denied, and then Bowden and Valerius filed an independent action, seeking the appointment of a receiver to sell the judgment, and it culminated in the sale of the judgment against Davis to Davis, through his agent Bowden. The judgment with interest then amounted to more than $240,000 and was sold for $9,120.00. Both the inter-

vention proceedings and the receivership proceedings were heard before Judge Williams, who was deceived by said false testimony and by the false allegations of the petition to the effect that Bowden and Valerius were acting for themselves and on behalf of all other stockholders, when in fact the proceedings were instituted for Davis and against the interest of the other stockholders. After the hearing at which the false testimony of Bowden and Valerius was given Judge Williams, who in the meantime had resigned and been succeeded by Judge Staley, testified that the proceedings 'went forward without my knowledge that Mr. Davis was concerned.'

"Judge Staley, from whose judgment vacating the sale and satisfaction of the judgment the present appeal was taken, found as follows:

> 'The court further finds that the defendant, Davis, and the said N. E. Bowden, and the other defendants herein associated with the said Davis and Bowden, including the said S. R. Thornburg, were guilty of fraud upon the District Court of Tulsa County, Oklahoma, and the receiver of the Davis-Malcona Company in the transaction wherein the said judgment was sold to the said S. R. Thornburg and that the said fraud consisted of withholding from the stockholders of Davis-Malcona Company, the District Court of Tulsa County, Oklahoma, and the receiver of the Davis-Malcona Company, the information that Bowden was acting for and on behalf of W. R. Davis and, further consisted of the said Bowden's affirmative acts and declarations to the effect that he was acting for himself and not for the said Davis, when in truth and in fact he was the paid agent of the said Davis to secure the satisfaction of said judgment or to acquire the ownership of said judgment.'

"The testimony of Judge Williams, set out above, shows that the court was imposed upon by said perjury and false allegations, and this is sufficient, under the decisions of this court, to justify vacating the sale. *Jones* v. *Snyder,* 121 Okla. 254, 249 P. 313;

Federal Tax Co. v. *Board of County Commissioners*, Okla. , 102 P. (2d) 148; 15 R. C. L. 705, 761; 34 C. J. 282.

"In the present case the deception practiced was cleverly screened by following an apparently adversary legal procedure, such as making the stockholders parties defendant, giving notice of the order to show cause, and the appointment of a receiver to sell the stock, which gave an additional appearance of fairness and good faith to the proceeding. But the court should look to the substance, not to the form. I cannot escape the conclusion that the proceeding resulting in the sale of this judgment was from its inception designed to, and did, perpetrate a fraud upon the court in which it was brought, and upon the stockholders who owned the judgment. From the purchase of stock by the agents of Davis, in order that they might, as apparently bona fide stockholders request that the judgment be sold, down to the consummation of their fraudulent purpose, every move made in the proceeding, and all the evidence produced by them, was made and done to conceal their real purpose, and to impose upon the court and the stockholders. No such deception or fraud as that contained in the record in the instant case was present in the cases relied upon in the majority opinion, on which the first syllabus is predicated.

"This cause had its beginning in 1924 in breach of trust and embezzlement and its ending in 1937 in deception, concealment and perjury. It is my view that courts of justice have no higher duty than to see to it that parties guilty of such conduct do not profit thereby. I regret to see this court render a decision that permits Davis to profit by his fraudulent scheme" (R., Vol. I, pp. 552-556).

[27072]
Press of Fremont Payne, Inc.

IN THE

Supreme Court of the United States

October Term—1942.

No. 531

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Executor under the Will of J. WALTER ZEBLEY, deceased; THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Trustee for MADGE F. KURTZ, and as Trustee for WM. B. KURTZ; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Trustee for FLORENCE M. MAGILL, under the Will of CHARLES L. McKEEHAN, deceased; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Executor of the Estate of ANTON W. EICHLER, deceased; ARLEIGH P. HESS; ALFRED HOEGERLE; GEORGE N. FLEMING; ELMER M. BUCKEY, as Executor of the Estate of MORRIS F. MILLER, deceased; ALBERT J. TAYLOR, as Trustee in Bankruptcy for KURTZ BROS.; HOWARD A. SEAVER; THOS. A. BIDDLE & CO.; GEORGE WOLBERT, as Executor for the Estate of CHAS. E. WOLBERT, deceased; ROBT. M. WILSON; CHAS. M. JONES; WALTER K. ZERRINGER; CHARLES F. SCHIBENER,

Petitioners,

AGAINST

JAMES LEE KAUFFMAN, as Executor of the Estate of WILLIAM RHODES DAVIS, deceased; HENRY W. WILSON; JAMES LEE KAUFFMAN; WILLIAM C. BLIND and DAVIS & COMPANY, INCORPORATED, a Nevada corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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INDEX.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

No.

THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Executor under the Will of J. WALTER ZEBLEY, deceased; THE PENNSYLVANIA COMPANY FOR INSURANCE ON LIVES AND GRANTING ANNUITIES, as Trustee for MADGE F. KURTZ, and as Trustee for WM. B. KURTZ; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Trustee for FLORENCE M. MAGILL, under the Will of CHARLES L. MCKEEHAN, deceased; THE FIDELITY PHILADELPHIA TRUST COMPANY, as Executor of the Estate of ANTON W. EICHLER, deceased; ARLEIGH P. HESS; ALFRED HOEGERLE; GEORGE N. FLEMING; ELMER M. BUCKEY, as Executor of the Estate of MORRIS F. MILLER, deceased; ALBERT J. TAYLOR, as Trustee in Bankruptcy for KURTZ BROS.; HOWARD A. SEAVER; THOS. A. BIDDLE & CO.; GEORGE WOLBERT, as Executor for the Estate of CHAS. E. WOLBERT, deceased; ROBT. M. WILSON; CHAS M. JONES; WALTER K. ZERRINGER; CHARLES F. SCHIBENER,

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Respondents.

THE OPINIONS OF THE COURTS BELOW.

The petition herein is for a writ of certiorari to the Supreme Court of the State of New York under 28

U. S. C. A., §344, subdivision (b), from the order and determination of the Court of Appeals of the State of New York dismissing the petitioners' appeal to that court on the ground that "no substantial constitutional question is involved", the petitioners having appealed to that court from the judgment of affirmance of the Appellate Division, dated March 4, 1942, entered in the office of the Clerk of New York County, on the ground that a constitutional question was involved. The memorandum opinion of the Court of Appeals is reported in 288 N. Y. 625 and the denial of the petitioners' motion for reargument of the appeal or leave to amend the remittitur is reported in 288 N. Y. 734. The Appellate Division of the Supreme Court of the State of New York, First Department, had affirmed the decision of the Special Term of the Supreme Court of the State of New York and its opinion is reported in 263 App. Div. 939. Mr. Justice Leary at Special Term, Part I, of the Supreme Court, New York County, in granting respondents' motion to dismiss the amended complaint of the petitioners, held that full faith and credit must be given to the judgment and mandate of the Supreme Court of Oklahoma (Opinion of Supreme Court of Oklahoma reported 180 Okla. 436). His decision has been affirmed by all the appellate courts of the State of New York.

Questions Involved.

Here, the petitioners attack, as they did in the Supreme Court of Oklahoma, in their several petitions to that court for rehearing and in all the courts of New York, the judgment and mandate of the Supreme Court of Oklahoma, asserting that it was in violation of their right to due process of law under the Fourteenth Amendment to the Constitution of the United States. They urged also in the courts of the State of New York, recognition should

not be given to the mandate on the ground that the Supreme Court of the State of Oklahoma was a corrupt court (Vol. I, p. 464). However, this ground has now been abandoned. Petitioners state their property is being taken without due process of law because they did not have their day in court as the Oklahoma Court was without jurisdiction over the subject matter. Under the cloak of "lack of due process", petitioners seek to attack the judgment of the Supreme Court of Oklahoma as erroneous. This they may not do at this time or in this proceeding.

The respondents contend that, commencing in 1937, petitioners have had many days in court and in courts of their own choosing and, as evidence thereof, the record filed herewith contains the following proceedings in which the petitioners were before the respective courts:

(a) Trial Record in the District Court of Oklahoma in its entirety (Vols. I, II, III, IV, pp. 557-2116);

(b) All of the briefs submitted upon the application to that court for writ of prohibition (Vol. V, pp. 2135-2433);

(c) All of the briefs submitted to the Supreme Court of Oklahoma on the merits (Vols. V, VI, pp. 2459-2749);

(d) Petitioners' two petitions to that court for rehearing and briefs submitted in connection therewith (Vol. VI, pp. 2821-2895);

(e) Petitioners' application to that court for leave to file a third petition for rehearing (Vol. VII, pp. 3616-3628);

(f) Proceedings at Special Term, Supreme Court, New York County (Vol. I, pp. 15, 3630) and the opinion of Mr. Justice Leary rendered at Special Term (Vol. VII, p. 3631);

(g) Order and judgment of affirmance of Appellate Division (Vol. VII, pp. 3649-3650);

(h) Petitioners' appeal to the Court of Appeals of the State of New York on a constitutional question and the remittitur of that court dismissing that appeal (Vol. VII, pp. 3643-3645, 3657);

(i) Petitioner's motion in the Court of Appeals for reargument or, in the alternative, for an order amending the remittitur and the denial of the motion (Vol. VII, pp. 3664, 3691).

There can be no doubt this case does not involve "lack of due process". Further proceedings would be "an abuse of process".

Time Within Which a Petition to This Court Should Have Been Filed Has Expired.

The petition herein, in form, is one for a writ of *certiorari* directed to the Supreme Court of the State of New York because of the taking of petitioners' property without due process of law but, in substance, its purpose is to review on the merits a final judgment and mandate of the Supreme Court of Oklahoma, dated June 21, 1940. It is undisputed in the petition (p. 10) that the petitioners invoked the jurisdiction and power of the courts of Oklahoma and, therefore, those courts had jurisdiction over the person of the petitioners. After reversal by the Supreme Court of Oklahoma of the decision of the District Court, the petitioners, then and there, by their petitions for rehearing and an application for a third petition, asserted that the District Court and Supreme Court of Oklahoma had no jurisdiction. They contended there, as here, that the Bowden and Valerius suit was fictitious and raised no justiciable controversy.

Upon final determination by the Supreme Court of Oklahoma, the petitioners, then, had the opportunity to appeal to this court. Petitioners realized this and filed in the Supreme Court of Oklahoma assignments of error

(Vol. I, pp. 507, 551), apparently preparatory to an appeal to this court. Petitioners, however, abandoned this procedure and collaterally attacked the mandate and judgment of the Supreme Court of Oklahoma in the courts of the State of New York for lack of jurisdiction. The time within which the petitioners could have petitioned this court for a writ of certiorari to the Oklahoma courts to attack the Oklahoma judgment as erroneous has long since expired. They cannot now, under the guise of attacking the judgment of the New York courts, bring up for review the merits of the judgment and mandate of the Supreme Court of Oklahoma. They cannot do now indirectly what they should have done directly two years ago. Under the decisions of this court, the New York courts, as this court now is, are bound by the findings of the Oklahoma courts of the jurisdictional fact that the Bowden and Valerius suit was *bona fide*.

Statement of Facts.

The statement of facts contained in the petition omits certain material facts which are necessary to a determination of the issues herein presented and, for that reason, we set them forth herewith.

Origin of Litigation.

On January 2, 1929, a *default* judgment was entered in the District Court in and for Tulsa County, Oklahoma (hereinafter referred to as the "District Court"), in an action which had been commenced in February, 1924 (Vol. II, p. 825), known as Cause No. 25845, against W. R. Davis (a respondent herein represented by James Lee Kauffman, Executor of his estate). Mr. Davis was not in Oklahoma and was probably in Peru at the time of the entry of such judgment (Vol. III, p. 1333). This judgment, in the sum of $169,123.47, was in favor of one

Wilfred H. Cunningham, Trustee, "for the benefit of Davis Malcona Company, a Corporation and the stockholders thereof" (Vol. I, pp. 23, 259). Thereafter, Davis Malcona Company became defunct (Vol. I, p. 434; Vol. II, p. 1008) and the judgment lay dormant from 1929 until May 1937.

Bowden and Valerius Suit.

At that time N. E. Bowden and George P. Valerius, as stockholders of Davis Malcona Company, filed an independent action in the District Court in which the judgment creditor and all stockholders of Davis Malcona (including these petitioners) were named as defendants. In this action the appointment of a receiver or trustee of the judgment was sought to collect, compromise, sell or otherwise liquidate it (Vol. I, pp. 23, 24, 26, 27). The purpose of this suit was to have a receiver appointed to sell the judgment at public auction to the highest bidder (Vol. III, p. 1119). This was denominated Cause No. 64226 in the District Court. A receiver was appointed, and Cunningham, the judgment-creditor, by his attorney, filed an answer and cross-petition, joining in the prayer for relief (Vol. I, pp. 27, 28-29). On July 17, 1937, the District Court made an order requiring all of the defendants (including these petitioners) to show cause why an offer made by said Bowden to the receiver for the purchase of the judgment should not be accepted. The receiver was ordered to mail a copy of the show cause order to each defendant named in said suit, and the defendants were thereby directed to present their claims in the judgment or the proceeds to be derived from its sale (Vol. I, pp. 29-31). Thereafter, a number of the defendants named in the Bowden and Valerius suit, including some of the petitioners, filed appearances and consented that the prayer of the petitioners be granted

(Vol. I, p. 31). All, save one, of the petitioners filed proofs of claim (Vol. II, p. 1021). On September 13, 1937, judgment was entered by the District Court on the Bowden and Valerius petition as prayed for directing acceptance of the offer of Bowden to purchase the judgment and ordering the sale and assignment of the judgment to one Thornburg, as nominee and confirming such sale (Vol. I, p. 31). The purchase price was paid to the receiver and, by him, distributed pursuant to the District Court's order and, thereafter, Thornburg executed a release and satisfaction of the judgment (Vol. I, p. 32).

Petitioners' Petition of October 22, 1937, in the District Court to Vacate the Judgment Entered in the Bowden and Valerius Suit.

Thereafter about five weeks later and on October 22, 1937, these petitioners came into the District Court and filed their petition in the very same action hereinabove referred to, having been previously commenced by Bowden and Valerius and known as Cause No. 64226,

> "* * * in order to give the court of *primary jurisdiction,* in which said judgment was rendered, opportunity to correct its record in said District Court of Tulsa County, Oklahoma, and to set aside the fraudulent proceedings brought therein * * *" (Italics ours) (Vol. I, p. 253)

and asked the District Court to vacate its order of September 13, 1937 entered in that action, which had directed a sale of the judgment of January 2, 1929 and had confirmed the sale. The Court was also asked by petitioners to expunge the release and satisfaction of said judgment of January 2, 1929 and to cancel and set aside all proceedings had in the Bowden and Valerius action

on the ground that fraud had been perpetrated on the District Court and on the petitioners (including the petitioners herein) (Vol. I, pp. 32-34). The said petition and all papers filed in respect thereof or in opposition thereto were numbered in the very same Cause No. 64226 in the District Court.

The said petition came on for trial in the District Court in May, 1938, and the District Court found the issues in favor of the petitioners and, on May 10, 1938, entered its judgment and order vacating and setting aside the said order of sale and confirmation of September 13, 1937, and expunging the satisfaction and release of the judgment of January 2, 1929 (Vol. I, pp. 36, 50).

Judgment of the District Court Entered on Petitioners' Petition Reversed by the Supreme Court of Oklahoma.

Thereafter, respondent Davis and defendant Thornburg duly appealed to the Supreme Court of Oklahoma, the court of last resort in such State, and the Supreme Court of Oklahoma, by its decision and opinion rendered February 13, 1940 (*Davis* v. *Pennsylvania Company, etc.,* 180 Okla. 436, 103 P (2d) 380), found no fraud under the law of Oklahoma, reversed the judgment of the District Court and reinstated the order of sale and confirmation and the release and satisfaction of the judgment of January 2, 1929 (Vol. I, pp. 20, 45, 51). Thereafter, the petitioners herein filed in said Supreme Court a petition for rehearing and a motion for oral argument thereon, which were denied by said Court on March 19, 1940 (Vol. I, p. 51; Vol. VI, pp. 2821-2894). They, then, filed a second petition for rehearing and motion for oral argument thereon, which were likewise denied by said Court on June 18, 1940 (Vol. I, p. 51; Vol. VI, pp. 2894-2985). Finally, they filed in said Court an

application for leave to file a third petition for rehearing and oral argument thereon, which was likewise denied on June 21, 1940 (Vol. I, p. 51; Vol. VII, pp. 3616-3629), and said Court, thereupon and on the same day, handed down its mandate to the District Court "reversing the judgment of the Trial Court" (Vol. I, pp. 18-19, 50-51). No petition in certiorari was filed in the Supreme Court of the United States, although Assignment of Errors were filed in the Supreme Court of Oklahoma (Vol. I, pp. 507-551).

Institution of the New York Action on February 26, 1938.

After petitioners, on October 22, 1937, had filed their petition in the District Court in Cause No. 64,226, and on or about February 26, 1938, four months later, they commenced the instant suit in New York against the respondents and defendants herein seeking the identical relief sought in their petition filed in the District Court of Oklahoma and alleged the identical fraud as the grounds for the relief prayed. In addition, they sought a judgment based on the Oklahoma judgment of January 2, 1929, against respondent Davis and a judgment against the other respondents for damages for aiding and abetting respondent Davis in perpetrating the alleged fraud (Vol. I, pp. 235-268; Vol. II, pp. 576-627).

The mandate of the Supreme Court of Oklahoma came down before respondents had answered the amended complaint. Thereupon, respondents moved at Special Term to dismiss the amended complaint in this action, pursuant to Rule 107 (5) and (7) of the Rules of Civil Practice on the ground that the amended complaint failed to state facts sufficient to constitute a cause of action in that the judgment sued on had been released and the judgment of the Supreme Court of Oklahoma, holding that there had been no fraud in the proceedings to pro-

cure the release of said judgment, was a final, binding adjudication of all of the issues made by the amended complaint (Vol. I, pp. 15-61). Special Term granted respondent's motion and its decision was affirmed by the Appellate Division. The petitioners then appealed to the Court of Appeals and procured a certificate from Judge Finch, one of the judges of that court, to the effect a constitutional question was involved. Subsequently, the Court of Appeals dismissed the appeal on the ground "no substantial constitutional question is involved" and denied a motion for reargument and for an order amending the remittitur (Vol. VII, pp. 3657, 3691).

Summary of Respondents' Contentions.

This court has no jurisdiction to entertain the petition since in fact no Federal question is involved. The Court of Appeals of the State of New York correctly held the judgment and mandate of the Supreme Court of the State of Oklahoma was entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States since it found the courts of Oklahoma had jurisdiction not only of the subject matter of the action but also of the person of the petitioners. Whether or not the judgment of the Supreme Court of Oklahoma is erroneous is not a Federal question involving due process, since petitioners admittedly have had their day in court not only in the State of Oklahoma but also in the State of New York.

POINT I.

There is no Federal question involved and, therefore, under the decisions of this court there is no jurisdiction to entertain the petition.

It is undisputed that the petitioners on October 22, 1937, filed their petition in the District Court of Oklahoma, in the self same cause as the Bowden and Valerius suit, to cancel and set aside all proceedings had in that suit (Vol. I, p. 253). Judgment was rendered in their favor in the District Court and no attack was, then, levelled by the petitioners against the jurisdiction of the Oklahoma courts. The respondents appealed to the Supreme Court of Oklahoma and that court reversed the District Court and found as a fact that the Bowden and Valerius suit was not fraudulent (Vol. I, pp. 20-42). Thereafter, the petitioners claimed in the Oklahoma Supreme Court itself that the Oklahoma courts had no jurisdiction. They argued

> "There is but one primary question of fact or law in this case, and that is whether the Bowden and Valerius suit was fraudulent in its *nature*, and that fact is conclusively proven by the evidence in this case" (Vol. VI, p. 2934).
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> * * * * *
>
> In connection with this jurisdictional question we ask the court to bear in mind the fact something more is necessary than jurisdiction of the parties and the subject matter. The court must also have jurisdiction to render the judgment it did render" (Vol. VI, p. 2978).

This argument was presented in several forms on several occasions to the Oklahoma Court (Vol. VI, pp. 2688-2689, 2888, 2890, 2912, 2934, 2975, 2978) and was rejected

on each occasion by the Supreme Court of Oklahoma. Thus, that court passed on the jurisdiction of its own District Court and of itself. That decision, whether right or wrong, cannot be collaterally attacked. It might have been questioned if at all on direct appeal but the time within which this question could have been raised has expired. This court so held through Mr. Justice Holmes in the case of *Chicago Life Insurance Co.* v. *Cherry,* 244 U. S. 25, stating (p. 30):

> "That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in *Forsyth* v. *Hammond,* 116 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. *It may be mistaken upon what to it is matter of fact the law of the other state but a mere mistake of that kind is not a denial of due process of law.* * * * Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been taken, but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of a man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. * * * But a decision upholding it upon the ground taken in the present case does not require us to review the Tennessee decision or to go further than we have gone."

Petitioners launched a collateral attack upon the judgment of Oklahoma court in the Supreme Court of New York on the grounds that the Oklahoma courts were without jurisdiction and submitted to the Supreme Court of New York the entire record of the proceedings had in Oklahoma. The courts of New York having decided that the

Oklahoma courts had jurisdiction were, therefore, bound to give full faith and credit to the mandate and judgment of the Supreme Court of Oklahoma. The Court of Appeals specifically found there was "no substantial constitutional question involved" and dismissed the petitioners' appeal. Its decision that the Oklahoma courts had jurisdiction is binding upon the petitioners. They were fully heard in Oklahoma on the very questions they raised in New York, and seek to raise there, and hence, there was no denial of petitioners' alleged constitutional rights.

This court, having established by its decisions that there is no violation of the due process clause even though a state court's decision was erroneous, has no jurisdiction under the Judiciary Act, since no Federal question is involved, to review the determination made by the New York courts.

> "An examination of this question, amongst others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no Federal question." *New Orleans Water Works Co.* v. *State of Louisiana,* 185 U. S. 336, 351; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 110-112.

The mere averment of a Federal question is not sufficient to give this court jurisdiction; there must be some fair ground for asserting its existence and it must exist in fact. *New Orleans Water Works Co.* v. *State of Louisiana, supra,* 344; *Hamblin* v. *Western Land Co.,* 147 U. S. 530, 533; *Sawyer, et al.* v. *Piper,* 189 U. S. 155, 157. The petitioners' contention of lack of due process is without merit since, admittedly, they were fully heard, in the regular course of judicial proceedings, both in the courts of Oklahoma and New York.

POINT II.

The courts of the State of New York were bound to give to the mandate of the Supreme Court of Oklahoma full faith and credit under Article IV, Section 1, of the Constitution of the United States.

Fauntleroy v. *Lum*, 210 U. S. 230, 237;
Baldwin v. *Travelling Men's Association*, 283 U. S. 522, 525;
Cromwell v. *County of Sac*, 94 U. S. 351;
Green v. *Van Buskirk*, 7 Wall. 139, 147, 148;
Carpenter v. *Strange*, 141 U. S. 87, 101.

POINT III.

The petitioners, having had their days in court of their own choosing, their argument they have been deprived of their property without due process of law is without merit.

This court said in the case of *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 352-353:

> "The state in this case has secured the forfeiture of the charter of the defendant by means of a judicial decree obtained in a state court which had jurisdiction to give the relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based have been judicially declared and found, and the defendant has had full opportunity for its defense upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture, because of a violation by

defendant of the conditions of its charter, was implied in the very grant of the charter itself. The claim therefore that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to defendant the equal protection of the laws,—cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject-matter, and its decision of the question was conclusive in this case so far as this court is concerned."

Chicago Life Insurance Co. v. *Cherry*, 244 U. S. 25, 30;

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 247 U. S. 157, 166;

Reynolds v. *Stockton*, 140 U. S. 254;

Carpenters & Joiners Union v. *Ritter's Cafe*, ... U. S. ...., 62 Sup. Ct. 807, 810.

In all of the decisions cited by the petitioners to sustain their contention that their property was taken without due process of law, the aggrieved party did not have a hearing or a trial upon the merits nor did he petition the courts whose jurisdiction was attacked, as did the petitioners in the case at bar. Thus, petitioners fail to bring themselves within any of those decisions. There is no dispute that petitioners appeared and submitted themselves to the jurisdiction of the Oklahoma courts, appealing to their consideration of the facts, not objecting to their power to proceed and not repudiating their jurisdiction but relying thereon. The logical conclusion of petitioners' argument here is that those courts had jurisdiction just so long as they agreed with them and no longer. As this court said in *Forsyth* v. *Hammond*, 166 U. S. 504, at page 517:

> "• • • If it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other."

Therefore, it is respectfully submitted petitioners' contention that their property was taken without due process of law is without merit.

CONCLUSION.

The Petition for Writ of Certiorari Should Be Denied.

Respectfully submitted,

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